82-430

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

LANDRUM L. LATTIMORE,

Petitioner

-against-

THE UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals, Second Circuit.

ROBERT RIVERS,P.C.
Attorney for Petitioner
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Suite 411
Hempstead,N.Y.11550.
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QUESTION PRESENTED FOR REVIEW

Whether the affirmance by the Second Circuit Court of Appeals of the denial of Petitioner's Section 2255 motion by the United States District Court, Southern District of New York, raising important issues regarding Petitioner's constitutional rights under the 5th, 6th and 14th amendments, conflicts with the established policy of the Second Circuit and deviate from that of other circuits so as to warrant a remand and reversal by this Court?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below were the United States of America and Landrum L. Lattimore.

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OPINIONS IN COURTS BELOW

The unpublished decision by District Judge John Cannella denying Petitioner's motion for relief pursuant to 28 U.S.C. Section 2255 is reproduced at P.35 . The unpublished opinion of the Second Circuit Court of Appeals affirming the District Court's denial of Petitioner's Section 2255 is reproduced at P. 39 .

JURISDICTIONAL STATEMENT

The decision of the United States District Court, Southern District of New York, sought to be reviewed here is dated January 27,1982.

The U.S.Court of Appeals for the Second Circuit affirmed the District Court's decision on May 17th,1982.

Jurisdiction of this Court is conferred by Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE

1. U.S.CONST.Amend.V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S.CONST.Amend.VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. U.S.CONST.Amend.XIN Section 1:

All persons born or naturalized

in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2255, Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney,

grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a senial or infringement of the constitutional rights of the prisoner as to render and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief,

unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25,1948, c.646, 62 Stat.967, May 24,1949, c.139, Section 114, 63 State,105.

STATEMENT OF THE CASE

The Petitioner, LANDRUM L.LATTIMORE, stands convicted after a jury trial before the Honorable John M.Cannella in the U.S. District Court for Southern District of New York of four counts of possession with intent to distribute a narcotic drug controlled substance in violation of Title21 of the United States Code. Sections 182 (9)(1) and 841(b)(1)(A). Federal jurisdiction in the District Court is based on this statute and 28 U.S.C. Section 2255. Petitioner was sentenced on February 9, 1981, by the Hon.Charles L.Brieant to concurrent terms of imprisonment of eight (8) years and to a period of special parole of three (3) years on each count and fined $40,000.00.

A Notice of Appeal from this convic-

tion was filed by counsel on February 9, 1981. On February 23,1981, a scheduling order was telephoned to counsel's office by the clerk of the Second Circuit Court of Appeals. It called for the record to be filed by March 2,1981, the brief and appendix by April 1,1981, and oral argument May 11,1981. This schedule could not be met due to a breakdown in communications with defendant and his family regarding the financing of the appeal inasmuch as the family was in dire financial straits, and regarding whether or not defendant wished to continue the services of counsel on the appeal. Moreover, counsel was unable to meet this schedule in light of the lengthy record and due to the fact that trial counsel was actually engaged in a protracted trial in New York

State Supreme Court. A Motion was therefore immediately made to the Court of Appeals for an extension of time to comply. The motion, dated February 27, 1981, was not decided until April 9,1981. On that date, the motion was denied and the appeal was dismissed simultaneously. Counsel immediately moved the Court of Appeals for reinstatement of the appeal to the Court's calendar, citing the reasons for the delay in perfecting the appeal and the substantial merits of the appeal, which include significant constitutional issues. This motion was denied on August 10,1981.

Thereafter a motion to vacate, set aside and correct sentence pursuant to 28 U.S.C. Section 2255 was made to the Honorable John M.Cannella. The motion

raised three issues which significantly affected the Petitioner's constitutional rights.

Petitioner, a diabetic and a heroin addict, was arrested by agents of the Drug Enforcement Administration (DEA) and held for thirteen hours without being arraigned by a magistrate or seen by an attorney. During this time Petitioner felt nauseous and dizzy, sweated profusely, and exhibited signs of withdrawal. He was denied medical attention after expressing a need for it. Inculpatory oral and written statements were taken from him at this time in violation of his fifth and fourteenth amendment rights.

Secondly, six tape recordings of alleged drug deals between Petitioner and confidential informant were made by the

DEA prior to Petitioner's arrest. The informant, whose name was never revealed, did not testify but allegedly consented to the recordings. The only foundation laid for the tapes was the testimony of a DEA agent who was not a party to the conversation.

Petitioner contends that transcripts of each tape prepared by the prosecution were constructed by guesswork. Over objection of defense counsel, the jury read the transcripts while listening to the tapes; the portion of the tape supporting the defense theory was not played inspite of Petitioner's request. The entire use of these tapes gave rise to two series of erros which, cummulatively, severely prejudiced Petitioner's right to a fair trial.

Thirdly, the trial judge and prosecutor engaged in unfair and prejudicial conduct which deprived the Petitioner his right to a fair trial under the Fifth, Sixth and Fourteenth Amendments. The trial judge lectured and berated defense counsel, took over questioning of witnesses. The prosecution was permitted insummation to tell the jurors that in order to acquit Petitioner they would have to believe that the DEA agent committed perjury.

Despite these important constitutional violations, Petitioner's motion was denied without a hearing on January 25,1982. On appeal to the Second Circuit Court of Appeals the denial of the motion was affirmed on May 17th,1982.

ARGUMENT

THE PEITTIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION FOR RELIEF UNDER SECTION 2255

An evidentiary hearing on a Section 2255 motion must be granted when the facts alleged would justify relief if true, or when a factual dispute arises as to whether or not a constitutional right is being denied. Procunier v.Atchlwz,400 U. S.446 (1971); Smith v. United States, 618 F. 2d 507,510 (8th Cir.1980); Willis v.Ciccone, 506 F.2d 1011,1019 (8th Cir. 1974). Since the District Court denied the motion without a hearing, its order is proper only if the motion and record show conclusively that the Petitioner is entitled to no relief. Otherwise, the order must be set aside and the cause remanded for a hearing. United States v.

Hayman, 342 U.S. 205 (1951); United States v. Davis, 212 F.2d 264, 266 (7th Cir. 1954). Clearly under this standard Petitioner in the case at bar should have at the very least been granted an evidentiary hearing on his petition. The record amply demonstrated Petitioner's entitlement to Section 2255 relief.

(a) The Petitioner is entitled to relief under 28 U.S.C. Section 2255.

Landrum Lattimore, a prisoner in federal custody, invoked Title 28 U.S.C. Section 2255 with respect to his sentence of eight years imprisonment, three years special parole, and a fine of $10,000.00 on each of four counts. Though the petition was denied by the District Court and the U.S. Court of Appeals for the Second Circuit, it is respectfully submitted that this proceeding presents a

compelling case for relief consistent with the construction and application of section 2255 since its enactment by Congress.

In Kaufman v. United States, 394 U.S. 217, 89S.Ct.1068(1969) the Supreme Court granted certiorari to consider whether a claim of illegal search and seizure could be raised in a collateral attack brought pursuant to section 2255, and proceeded to set forth the policy considerations applicable to such proceedings. The Court noted that section 2255 was enacted in order to "minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum, Kaufman v. United States, supra, 394 U.S. at 221, quoting Hill v. United States, 364 U.S.424, 82S.Ct.

468(1962). The Court went on to state:

> The provision of federal collateral remedies rests...upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief.

Kaufman v.United States,op.cit.,at 226.

It is Lattimore's contention that he was deprived of the right to appeal through no fault of his own and despite the efforts of his counsel to preserve his appeal. Nevertheless, relief has been granted under Section 2255 even where there is not a sufficient explanation for the failure to appeal. In Grimes v.United States, 670 F.2d 6(2nd Cir.1979) the Petitioner instituted a Section 2255 proceeding after his appeal had been dismissed. The petition was denied by the District Court without a hearing. Noting

the "remedial" nature of the statute, and despite several procedural obstacles, the Court of Appeals reversed, stating:

> .....a prisoner whose claim is based 'a significant denial of a constitutional right' or 'an error of significant constitutional dimension' may invoke the protections embodied in Section 2255 'even though he could have raised the point on appeal and there was no sufficient reason for not doing so.' (Citations omitted) 7 607 F.2d at 10.

It must be noted in this context that Lattimore did not bypass the appellate procedure. Rather, his appeal was foreclosed by a procedure which apparently favors judicial 'efficiency' at the expense of fundamental rights. On the issue of habeas corpus relief the Supreme Court stated, in Fay v.Noia,372 U.S.291,83S.Ct. 882(1963) that

> Conventional notions of finality cannot be permitted to defeat manifest federal policy that federal

> constitutional rights of personal liberty are not to be denied without the fullest opportunity for punary federal judicial review.

Moreover, it has expressed the policy that an appeal from a judgment of conviction in a federal district court is "a matter of right", Rodriquez v. United States, 395 U.S.327, 89S.Ct.1715 (1969). In Chapman v. United States, 469 F.2d 634 (5th Cir.1972) the Fifth Circuit stated:

> ....an appeal from a district court's judgment of conviction in a criminal case is a matter of right... Abridgement of this right is incompatible with the most basic concept of due process.
>
> (Citations omitted)

469 F.2d at 636. The Court, in Chapman dealt at length with the issue of waiver of the right to appeal, and reversed and remanded for a hearing on the facts. In the case at bar, it is clear that at no time did Lattimore waive his right to

appeal.

Although habeas corpus relief is not granted in every situation where an appeal has been dismissed, it is respectfully submitted that the substantial constitutional merits of the instant case place it squarely within the realm of cases where such relief has been deemed appropriate and necessary. In general, relief under section 2255 is afforded where a defendant has been prejudiced by errors of constitutional dimension which give rise to a 'fundamental defect which inherently results in a miscarriage of justice ..." Keel v.United States,585 F. 2d 110(C.A.Ala. 1978). The instant case is distinguishable from Alessi v. United States,593F.2d 476 (2nd Cir.1979)in which the Court of Appeals following Del Vecchio v. United States

556F.2d 106(2nd Cir.1979) refused to reinstate the Petitioner's appeal from a conviction entered after a plea of guilty. In the case at bar, Lattimore was found guilty after a jury trial which was fraught with errors affecting his constitutional rights. He seeks review of these errors in the course of the appellate process, but has been foreclosed from this avenue of redress through no fault of his own or of counsel's. There is no question of abandonment or waiver at issue: rather the Petitioner has persisted in his efforts to have his conviction reviewed. The issues he seeks to raise are those discussed in the statement of the case - the admission of involuntary statements, the use by the prosecution of tape recordings, and the conduct of judge and prosecutor

during the trial.

It is respectfully submitted that the substantial merits of Petitioner's appeal, when combined with the manner in which his appeal was dismissed, resulted in a grave miscarriage of justice which must be rectified under Section 2255. As construed by the Supreme Court in Kaufman, supra and the Second Circuit in Grimes, supra, this section is designed to afford relief in cases such as these, and its remedial provisions should be invoked herein to restore the Petitioner's rights.

(b) The Petition should be remanded for further proceedings:

Despite the merit of Petitioner's application, it was summarily denied. The District Court chose not to address the major issues raised in Petitioner's petition and memorandum of law. Instead,

the Court relied on its earlier determination which denied Petitioner's motion for a new trial; the Second Circuit Court of Appeals affirmed the District Court ruling.

Contrary to the Second Circuit holding,the Fifth Circuit Court of Appeals in Crockett v. United States, 593 F.2d(5th Cir.1979) reversed and remanded a similar ruling by a District Court. There, as in the instant case, appellant made a motion for a new trial at the close of the proceedings against him. It was denied. Mr.Crockett then made a Section 2255 motion to the same court raising new issue in addition to those in his trial motion. In language reminiscent of that used by Judge Cannella, nisi prius succinctly stated that Crockett had raised

substantially the same question presented earlier in his motion for new trial. "The District Court having denied the motion for new trial now denies the motion to vacate sentence", Crockett, 593 F.2d at 7. The appellate Court remanded the case back to the District Court for further proceedings on the 2255 claim ruling the summary determination improper. Because of the new issues raised Petitioner was entitled to a hearing. Crockett v. Un ed States, 593 F. 2d 5(5th Cir.1979); Johnson v.United States,567 F.2d 634(5th Cir.1978); McKnight v.United States,507F 2d 1034(5th ir.1975); Lacaze v.United States,427 F.2d 144 (5th Cir.1970).

The ruling in Petitioner's case by the Court of Appeals for the Second Circuit conflicts with these rulings by

the Court of Appeals for the Fifth Circuit on evidentiary hearings after a District Court has denied a Section 2255 motion. The Fifth Circuit Court of Appeals has remanded such decisions to the District Court if they were reached without making findings of fact, Lacaze v.United States, 427 F. 2d 144 (5th Cir. 1970), or if the motion raised new issues, Crockett v.United States,593 F.2d 5(1979) or if issues had been previously raised but not disposed of on the merits by the District Court, Johnson v. United States, 567 F. 2d 634 (1978), Crockett v. United States, 593 F. 2d 5(1979).

Similarly, the Court of Appeals for the Second Circuit should have reversed and remanded the District Court ruling for an evidentiary hearing in this case.

The record reveals that Petitioner raised an issue on his Section 2255 motion that was not addressed in his motion for a new trial (see appendix for District Court opinion, P1,2). This issue concerned the assistant U.S.Attorney's improper remarks to the jury that the jury must disbelieve DEA agent Magnunson's testimony in order to acquit the Petitioner.

The District Court Judge gave short shrift to this argument stating in his denial of the Section 2255 motion that the prosecutor's remarks were proper for rebuttal summation. However, the improper remarks were also made in direct questioning and this was never addressed either by the District Court or the Court of Appeals.

Furthermore, the issues raised by

Petitioner were not decided on the merits either by the District Court or the Court of Appeals because no hearing was involved, Tucker v. United States, 427F. 2d 615, 617. The Second Circuit decision conflicts with the D.C.Circuit as well. The Court of Appeals for the District of Columbia has ruled that post conviction relief may only be denied without a hearing if (1) the motions, files and records conclusively show that prisoner is entitled to no relief; (2) grounds for relief were previously determined on merits after adequate hearing and ends of justice would not be served by reaching merits of new application; (3) the government can show successive application for relief is abuse of remedy, or; (4) applicant has deliberately bypassed ordinary procedures

for review available to him. Tucker v. United States,427 F.2d 615,138U.S.App.D. C.345 on remand 328 F.Supp.1312.

None of these four standards was satisfied in Petitioner's case. It is respectfully submitted that the Second Circuit Court of Appeals should have remanded the case for an evidentiary hearing and further proceedings by the District Court to determine the issues on their merits rather than affirming the decision of the District Court. Johnson v.United States,567 F.2d 634(5th Cir.1978); McKnight v.United States,507 F.2d 1034 (5th Cir.1975); Crockett v.United States, 593 F.2d 5(1979); Tucker v.United States, 427F.2d 615 D.C.Cir.1970. Otherwise under the conflicting positions of the Second, Fifth and District of Columbia circuits,

appellants in the Fifth and D.C.circuits will be granted 2255 relief while those in the Second Circuit will be denied it. The decision in the case at bar also conflicts with the Second Circuit Court of Appeals own ruling in Grimes, supra, as previously discussed since significant denials of Petitioner's constitutional rights have been raised in this motion.

This Writ of Certorari is Petitioner's last avenue of rederess. His claims have never been argued before any court other than the Southern District Court and Judge Cannella. His direct appeal was summarily dismissed through no fault of his own or his counsel, without a judgment of the merits of the appeal. Similarly, his Section 2255 motion was denied by both the District Court and the Court of Appeals

without hearing and without a judgment on the merits.

It is respectfully submitted that in light of the foregoing, the Writ of Certorari to the U.S.Court of Appeals for the Second Circuit should be granted.

A-788 COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK X

UNITED STATES OF AMERICA,

-against-

MEMORANDUM AND ORDER

LANDRUM L. LATTIMORE,
Defendant.

82 Civ.189 (JMC)

X

CANNELLA, D.J.:

Defendant's motion for relief pursuant to 28 U.S.C. Section 2255 is denied.

In the instant motion, defendant raises the same three issues raised in his motion for a new trial, which the Court denied on December 24, 1980. See United States v. Lattimore, 75 Cr.431 (S.D.N.Y.Dec.24,1980). Because the Court sees no reason to alter its prior determination, this portion of the instant motion is denied for the reasons set forth

in the December 24,1980, decision.

One of three issues previously raised and decided concerned the conduct of the Court and the prosecutor during defendant's trial. In the instant motion, defendant has supplemented his prior assertions in this area with the contention that the Assistant United States Attorney was improperly permitted to argue to the jury that it would have to disbelieve Agent Magnunson's testimony to acquit the defendant. The Court finds, however, that the prosecutor's remarks were entirely proper as rebuttal summation. Moreover, defendant's generalized allegations of professional misconduct on the prosecutor's part are frivolous. Assistant United States Attorney Mann exhibited great patience and courtesy in the face

of defense counsel's persistent dilatory tactics, and her conduct consistently conformed with the high professional standards expected of prosecutors in this district.

Finally, defendant argues that his right to appeal has been denied. Defendant's direct appeal to the Second Circuit Court of Appeals was dismissed for failure to comply with that court's scheduling order, and his motion for reinstatement of the appeal was denied. Defendant contends that the Court of Appeals acted improperly and that this somehow constitutes a ground for relief under section 2255. The Court, however, will not second-guess the Court of Appeals. Therefore, this portion of the instant motion is also denied.

In accordance with the foregoing, defendant's motion for relief pursuant to 28 U.S.C. Section 2255 is denied in all respects.

SO ORDERED

/s/ John M. Cannella

United States District Judge

Dated: New York, N.Y.
January 25, 1982.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York on the seventeenth day of May One Thousand Nine Hundred and Eighty-Two.

Present:

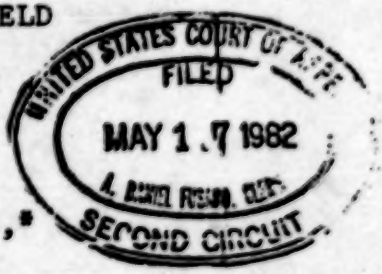
HONORABLE WALTER R. MANSFIELD

HONORABLE AMALYA L. KEARSE

Circuit Judges.

HONORABLE JOSE' A. CABRANES,*

District Judge.



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* Of the United States District Court for the District of Connecticut, sitting by designation.

82-2054

LANDRUM L. LATTIMORE,
Petitioner-Appellant

-against-

UNITED STATES OF AMERICA,
Respondent-Appellant.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used unrelated cases before this or any other court.

Landrum L. Lattimore appeals from an order of the Southern District of New York entered on January 25,1982, by Judge John M.Cannella, denying his motion under 28 U.S.C. Section 2255 to vacate a prison sentence and fine imposed upon him on February 9,1981, following a jury trial resulting in a verdict finding him guilty of four counts of possession of heroin with intent to distribute it, 21 U.S.C.

sections 812, 841(a)(1), and 841(b)(1)(A). Lattimore's appeal from his conviction was dismissed when he failed to perfect it and his attempt to reinstate it was denied.

Ths district court properly denied without hearing Lattimore's claim that his post-arrest statements were involuntary and the product of unlawful pre-arraignment delay. After an exhaustive evidentiary pretrial hearing, the trial judge made factual findings to the contrary, which were amply supported by evidence. The judge further charges the jury that it should consider Lattimore's statements only if it found them to be voluntary. The record also reveals that Lattimore, after receiving proper Miranda warnings and advising the DEA agents that he wanted to cooperate, expressly waived in writing a

speedy arraignment following his request that he be permitted to remain in his home overnight, which was allowed.

Nor did the district court err in denying without hearing Lattimore's contention that the trial judge had improperly admitted in evidence tape recordings of his pre-arrest statements and allowed the jury to use transcripts in listening to the tapes. The tapes were properly authenticated by Agent Magnunson and the informant who participated with Lattimore in the taped conversations was made available as a witness. The trial judge's decision to allow the government to play relevant portions was proper, Fed.R.Evid. 1006; United States v. Weisman, 624F. 2d 1118, 1128-29 (2d Cir.), cert. denied, 449 U. S. 871(1980), especially since Lattimore

was offered the opportunity to play any other portions. We find no abuse of discretion in the court's conduct of the audibility hearing, United States v. Bryant, 480 F. 2d 785,790(2nd Cir.1973), since lack of clarity would go to the weight rather than the admissibility of the tapes, United States v.Provenzano, 615 F. 2d 37,40 n.4(2d Cir.),cert.denied, 446 U.S.953 (1980). Nor did the trial judge err in permitting the jury to use transcripts, which were not received in evidence, as aids in interpreting the tapes. There was no objection at trial to the accuracy of the transcripts. The tapes and transcripts were provided to the defendant well in advance of trial,United States v.Chiarizio,525 F. 2d 289(2d Cir. 1975); United States v.Slade,627 F. 2d

293 (D.C.Cir.),cert.denied,440 U.S.1034 (1980). Lattimore was further protected by the Court's instruction to the jury that the tapes were the sole evidence, not the transcripts.

Lattimore's claims of misconduct by the trial judge and the trial prosecutor must also be rejected. The record reveals that the trial judge's limited questioning of witnesses and comments were proper under the circumstances, that the prosecutor's closing argument and comments were well within permissible bounds, and that Lattimore received a fair trial.

The denial of Lattimore's Section 2255 petition is affirmed.

(sgd) Walter R.Mansfield
U.S.C.J.
(sgd) Amalya L.Kearse,
U.S.C.J.
(sgd) Jose' A.Cabranes,
U.S.C.J.